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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 LV DIAGNOSTICS, LLC,

8 Plaintiff(s),

9 v.

10 THE HARTFORD FINANCIAL SERVICES
11 GROUP, INC., et al.,

12 Defendant(s).

Case No. 2:17-CV-1371 JCM (PAL)

ORDER

13
14 Presently before the court is defendant Hartford Financial Services Group, Inc.'s
15 ("Hartford") motion to dismiss. (ECF No. 5). Plaintiff has not filed a response, and the time for
16 doing so has since passed.

17 Also before the court is defendant Hartford and defendant Sentinel Insurance Company,
18 Ltd.'s ("Sentinel") joint motion to dismiss. (ECF No. 6). Plaintiff LV Diagnostics, LLC filed a
19 response (ECF No. 10), to which defendants replied (ECF No. 12).

20 **I. Facts**

21 Plaintiff and defendant Sentinel entered into an insurance contract covering the building
22 and business personal property located at 600 South Martin Luther King Blvd., Las Vegas,
23 Nevada. (ECF No. 1). The coverage dates for the policy ran from December 1, 2014 to December
24 1, 2015. *Id.* On April 8, 2015, someone broke into plaintiff's business and stole a large amount
25 of plaintiff's medical and business equipment. *Id.* Plaintiff alleges that the equipment was covered
26 by the policy. *Id.*

27 On April 13, 2015, plaintiff submitted a claim to defendants regarding the lost property.
28 *Id.* On June 15, 2015, defendants wrote to plaintiff, stating that in attempts to complete their

1 investigation and adjustment of loss defendants needed additional documentation to support
2 plaintiff's claim. *Id.* Plaintiff sent defendants the requested documentation. *Id.* On July 6, 2015,
3 defendants again wrote plaintiff to state that the provided documentation was insufficient. *Id.* The
4 letter requested additional records. *Id.*

5 Plaintiff states that on at least two occasions thereafter it provided defendants with
6 supporting documentation. *Id.* "Each time the documentation was deemed insufficient by
7 Defendants and the claim denied." *Id.*

8 **II. Legal Standard**

9 A court may dismiss a complaint for "failure to state a claim upon which relief can be
10 granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain
11 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*
12 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
13 factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the
14 elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

15 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
16 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
17 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. 662, 678 (citation
18 omitted).

19 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
20 when considering motions to dismiss. First, the court must accept as true all well-pled factual
21 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
22 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
23 statements, do not suffice. *Id.* at 678.

24 Second, the court must consider whether the factual allegations in the complaint allege a
25 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint
26 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
27 alleged misconduct. *Id.* at 678.

1 Where the complaint does not permit the court to infer more than the mere possibility of
2 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*
3 (internal quotation marks omitted). When the allegations in a complaint have not crossed the line
4 from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

5 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
6 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

7 First, to be entitled to the presumption of truth, allegations in a complaint or
8 counterclaim may not simply recite the elements of a cause of action, but must
9 contain sufficient allegations of underlying facts to give fair notice and to enable
10 the opposing party to defend itself effectively. Second, the factual allegations that
are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery and
continued litigation.

11 *Id.*

12 **III. Discussion**

13 *a. Plaintiff’s claims against Hartford*

14 As an initial matter, the court will grant defendant Hartford’s unopposed motion to dismiss.
15 Pursuant to LR 7-2(d), “[t]he failure of an opposing party to file points and authorities in response
16 to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney’s fees, constitutes
17 a consent to the granting of the motion.” Plaintiff’s failure to respond to defendant’s motion
18 constitutes consent to granting of the motion. Further, as defendant is not plaintiff’s insurer and
19 is not in privity with plaintiff, dismissal of plaintiff’s claims against defendant is appropriate. *See*
20 *Winkler v. Hartford Financial Services Group, Inc.*, no 2:10-cv-02222-RLH-LRL, 2011 WL
21 1705559, at *2 (D. Nev. May 3, 2011).

22 *b. Plaintiff’s second, third, fourth, and fifth claims*

23 *i. Breach of the covenant of good faith and fair dealing (contractual)*

24 In Nevada, “[e]very contract imposes upon each party a duty of good faith and fair dealing
25 in its performance and execution.” *A.C. Shaw Constr., Inc. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev.
26 1989). This implied covenant requires that parties “act in a manner that is faithful to the purpose
27 of the contract and the justified expectations of the other party.” *Morris v. Bank of Am. Nev.*, 886
28 P.2d 454, 457 (Nev. 1994) (internal quotation marks omitted).

1 “When one party performs a contract in a manner that is unfaithful to the purpose of the
2 contract . . . damages may be awarded against the party who does not act in good faith.” *Hilton*
3 *Hotels v. Butch Lewis Prods.*, 808 P.2d 919, 923 (Nev. 1991). A breach of the duty of good faith
4 and fair dealing can occur “[w]here the terms of a contract are literally complied with but one party
5 to the contract deliberately contravenes the intention and spirit of the contract.” *Id.* at 922–23.
6 However, when allegations in a complaint allege facts that establish a violation of the express
7 terms of the policy, but do not suggest compliance with the policy, a claim for breach of the
8 covenant of good faith and fair dealing unnecessarily duplicates a claim for breach of contract.
9 *Kennedy v. Carriage Cemetery Servs.*, 727 F. Supp. 2d 925, 931 (D. Nev. 2010).

10 Here, plaintiff’s allegations in its complaint, and specifically those in its second claim for
11 relief, allege that defendants breached Sentinel’s contract with plaintiff by “refusing to properly
12 compensate plaintiff pursuant to its rightful claim for losses under said insurance contract.” (ECF
13 No. 1). These allegations do not support a claim that defendants abided by the express terms of
14 the contract but contravened its spirit. Accordingly, the court will dismiss plaintiff’s claim for
15 breach of the contractual covenant of good faith and fair dealing without prejudice.

16 ii. *Tortious breach of the covenant of good faith and fair dealing/bad faith*

17 “To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff
18 must establish that the insurer had no reasonable basis for disputing coverage, and that the insurer
19 knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage.”
20 *Powers v. United Servs. Auto. Ass’n*, 962 P.2d 596, 604 (1998), *modified on denial of reh’g*, 979
21 P.2d 1286 (Nev. 1999) (citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991)); *see also Pioneer*
22 *Chlor Alkali Co. v. Nat’l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1249 (D. Nev. 1994) (refusing
23 to find bad faith where insurance company investigated damage and requested documents, despite
24 insured’s argument that investigation was incomplete). Refusing to compensate for a loss covered
25 by an insurance contract is a factual allegation of breach of contract, not breach of the covenant of
26 good faith and fair dealing. *Id.* (“the insurer is not liable for [tortious] bad faith for being incorrect
27 about policy coverage as long as the insurer had a reasonable basis to take the position that it did.”).

1 Here, plaintiff asserts that its allegations regarding defendants' refusal to pay out plaintiff's
2 claim after plaintiff provided four rounds of supporting documentation states a claim bad faith.
3 (ECF Nos. 1, 10). The court disagrees. Neither these allegations, nor the other allegations in
4 plaintiff's complaint, adequately allege that defendant lacked a reasonable basis for its denial or
5 knew it lacked a reasonable basis to deny plaintiff's claim. As defendants note, "Plaintiff does not
6 even allege the amount of coverage, the items claimed to be covered, or claim that the
7 documentation submitted to Sentinel was sufficient." (ECF No. 6). The court will dismiss
8 plaintiff's claim for tortious breach of the covenant of good faith and fair dealing without prejudice.

9 As the parties note in their filings, plaintiff's bad faith claim is duplicitous of plaintiff's
10 tortious breach claim. (ECF Nos. 6, 10). The court will therefore dismiss plaintiff's claim for bad
11 faith with prejudice.

12 *iii. Violation of NRS 686A.310*

13 As an initial note, plaintiff's complaint lists its fifth cause of action as "Unfair Trade
14 Practices." However, both parties' filings related to defendants' motion to dismiss discuss NRS
15 686A.310 only. The title of subsection 300 of NRS 686A is "Claims," and the title of NRS
16 686A.310 is "Unfair practices in settling claims." *Compare id., with* NRS 598A ("Chapter 598A
17 - Unfair Trade Practices"); *cf. McKinnon v. Hartford Ins. Co.*, No. 2:12-cv-01809-RCJ-CWH,
18 2013 WL 1088702 (D. Nev. Mar. 14, 2013) (using the term "Unfair Claims Practices Act" to
19 describe NRS 686A.310). Accordingly, the court assumes that plaintiff intends her claim to state
20 violations of NRS 686A.310, and will use the term "Unfair Claims Practices Act" for clarity.

21 Defendants argue that plaintiff's complaint fails to adequately plead a cause of action for
22 violation of the Nevada Unfair Claims Practices Act. (ECF No. 6). Plaintiff responds that its
23 complaint, when considered in its entirety, adequately pleads violations of NRS 686A.310. (ECF
24 No. 10).

25 NRS 686A.310(1) sets forth various activities considered to be unfair claims practices.
26 Nev. Rev. Stat. § 686A.310(1). In order to properly plead a violation of NRS 686A.310, a plaintiff
27 must plausibly allege that defendant violated at least one provision of the act. *McKinnon*, 2013
28 WL 1088702, at *5.

1 Here, plaintiff's fifth cause of action alleges that defendants failed in their obligation to
2 provide coverage on plaintiff's claim. This legal conclusion is not sufficient to defeat a motion to
3 dismiss for failure to state a claim. *See Iqbal*, 556 U.S. at 678–79.

4 Plaintiff's fifth cause of action also incorporates by reference all prior allegations in the
5 complaint. Plaintiff's complaint alleges that it corresponded back-and-forth with defendant on
6 multiple occasions, and rests on this repeated correspondence along with defendant's eventual
7 denial of plaintiff's claim to support its claim for violation of NRS 686A.310. As the court noted
8 in its discussion of plaintiff's tortious breach of the covenant of good faith and fair dealing claim,
9 plaintiff's complaint provides no more than conclusory statements that defendants improperly
10 denied plaintiff's "rightful claim." This is not adequate to state a cause of action for breach of
11 NRS 686A.310. *See McKinnon*, 2013 WL 1088702, at *5.

12 Plaintiff alleges that at minimum, defendant has violated subsections (d) and (e) of NRS
13 686A.310(1). These subsections pertain to "(d) [f]ailing to affirm or deny coverage of claims
14 within a reasonable time after proof of loss requirements have been completed and submitted by
15 the insured. . . . [and] (e) [f]ailing to effectuate prompt, fair and equitable settlements of claims in
16 which liability of the insured has become reasonably clear." NRS 686A.310(1).

17 Here, plaintiff's complaint states that defendants denied coverage after proof of loss
18 requirements had been completed, and plaintiff does not assert that defendants' denial took an
19 unreasonable amount of time. Therefore, plaintiff's complaint does not adequately plead that
20 defendants violated subsection (d) of NRS 686A.310. *See McKinnon*, 2013 WL 1088702, at *5.
21 Further, plaintiff's complaint, when stripped of its conclusory legal assertions, does not adequately
22 plead that defendants' liability is reasonably clear under the contract. *See id.* The court will
23 dismiss defendant's fifth cause of action without prejudice for failure to state a claim upon which
24 relief can be granted.

25 **IV. Conclusion**


26 Accordingly,

27 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant Hartford's
28 motion to dismiss (ECF No. 5) be, and the same hereby is, GRANTED.

1 IT IS FURTHER ORDERED that defendants Hartford and Sentinel's motion to dismiss
2 (ECF No. 6) be, and the same hereby is, GRANTED, consistent with the foregoing.

3 IT IS FURTHER ORDERED that plaintiff's claims for contractual breach of the duty of
4 good faith and fair dealing, tortious breach of the duty of good faith and fair dealing, and violation
5 of NRS 686A.310 be, and the same hereby are, dismissed without prejudice. Plaintiff's claim for
6 bad faith is dismissed with prejudice.

7 DATED January 31, 2018.

8 
9 UNITED STATES DISTRICT JUDGE